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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1395

GRIFFIN & BRAND OF McALLEN, INC.,
Petitioner,

versus

PETER J. BRENNAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF
OF
TEXAS CITRUS AND VEGETABLE GROWERS
AND SHIPPERS

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OF
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TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS, with the consent of the parties filed herewith, files this Brief as *Amicus Curiae* in support of PETITIONER'S Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on January 4, 1973.

INTEREST OF AMICUS CURIAE

TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS, (hereafter called "ASSOCIATION"), is a nonprofit association whose members are growers and shippers of perishable fruits and vegetables in the State of Texas. Its members are engaged in the planting, growing, packing and preparing for shipment and shipping of citrus fruits, such as grapefruit, oranges, lemons and tangerines, and various varieties of fresh vegetables, such as onions, lettuce, peppers, potatoes, carrots and tomatoes. The ASSOCIATION'S membership represents ninety percent (90%) of the perishable fresh fruits and vegetables shipped from the State of Texas. The main office of the ASSOCIATION is in Harlingen, Texas.

The questions presented in the Petition involve the employment status, under the Fair Labor Standards Act, 29 U.S.C.A. §201, *et seq.*, (hereafter called "Act"), of harvesting employees of labor contractors, (referred to sometimes below as "crew leaders", who, through contract, provide harvesting and preharvesting services to a grower and/or shipper of farm produce), in relation to their employer, (the labor contractor), and the grower and/or shipper.[1] The Courts below held in the instant case that the labor contractor and grower and shipper were "joint employers", or,

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[1]The term "grower and/or shipper" refers to two basic situations: (1) where the grower (farmer) is the owner of the produce harvested and also the shipper of the produce; (2) where the grower is a separate person from the shipper, but his produce is under contract for delivery to a shipper.

stated another way — were both employers of the harvesting employees. The effect of these holdings makes the grower and/or shipper, as the case may be, responsible for any violations of the Act by the labor contractor vis-a-vis his employees and, as a practical matter, an enforcer of the Act by virtue of the application of the hot goods provisions.

The very nature of the growing of perishable fruits and vegetables and of their harvest due to their perishability, which require harvest during critical and sometimes very brief periods, coupled with the difficulty of procuring sufficient pre-harvesting and harvesting workers needed at critical times, have required the ASSOCIATION'S members to contract with labor contractors to furnish this vitally needed labor service. The use of labor contractors among growers and/or shippers is a practice not only in Texas, but also in other similar agricultural producing areas of the nation.

As stated by the District Court below in its Memorandum Opinion:

> ". . . (Petitioner) and all others similarly engaged in using the same system for employing harvesting crews must be responsible for seeiing that the harvesting crews come under the protection of the Fair Labor Standards Act."

Moreover, since the decision in the Courts below, representatives of RESPONDENT have noted in the press that these Court holdings have wide application in the agricultural industry.

The ASSOCIATION'S membership has a vital interest in the ultimate outcome of this case, as do all those similarly engaged in the agricultural industry in this country, as well as the housewives, who ultimately buy our nation's supply of fresh fruits and vegetables.

REASONS FOR GRANTING THE WRIT

The Court below, in holding that the grower and shipper and labor contractor are joint employers of the harvesting employees of the labor contractor, has imposed a "joint employer" concept in agricultural employment relations, which is contrary to Congressional intent, as reflected by legislative history of the 1966 Amendments to the Act, (when the agricultural industry was first brought under the minimum wage provisions of the Act), and contrary to the principles announced in applicable decisions of this Court.

The fresh fruit and vegetable portion of the agricultural industry is a complicated industry fraught with problems, including labor supply problems, due to the inherent nature of this type of produce. The employment relationship under the Act between employees of a labor contractor and the growers and/or shippers with whom he contracts is very important to the agricultural industry. The effect of the holdings below imposes not only financial and supervisory responsibility upon the grower and/or shipper for any violations of the Act by a labor contractor vis-a-vis his employees, but also by virtue of the hot goods holding, an enforcement responsibility, which is not a duty of

the private sector, but of the Government itself. The questions presented in this case are important federal questions dealing with an important industry in our country, which have not been considered by this Court. Because of the significant future effect of these holdings upon the agricultural industry, review by this Court is vitally needed.

Brief Background of Agricultural Employment Problems

In the past several years, agricultural employees have received nationwide attention. Their problems, as well as those of growers and/or shippers, have been debated in Congress, in the press and elsewhere, and the relative positions of each elucidated more so than ever before.

That part of the agricultural industry engaged in the production and distribution of fresh fruits and vegetables is engaged in a highly complicated industry. This is mainly due to the essence of its produce — that is, *fresh* fruits and vegetables. The growing of these products is dependent upon weather, pests and other conditions, which the talents of man have been unable to control to any degree of success. Planting and other pre-harvesting operations must be accomplished at particular times, despite growing conditions, or economic loss is suffered. Once the produce is ready for harvest and market, due to its perishability, it is critical that it be harvested and shipped during short periods of time or seasons, and as rapidly as possible.

It is a "hurry up and wait" industry, for, between these periods of extreme activity, the grower must wait and pray the produce flourishes under conditions offered by nature. As to agricultural employees, this means highly seasonal work. Growers and shippers cannot offer year-round employment for the maximum number of field employees that may be needed during the year. Because of this, growers and/or shippers have faced critical labor supply problems. This is especially true for harvesting operations where large numbers of employees are needed for short periods of time. In the South Texas area, this has been more critical because of the migrant problem, but offset to a limited degree by the availability of labor due to its geographical proximity to Mexico.

In years past, the harvesting of farm products and most pre-harvesting operations were mainly by hand labor; however, due to the unavailability of a sufficient labor supply and increased labor costs, it has been necessary for the agricultural producer to utilize mechanization as much as possible. The use of machines has been successful as to some agricultural products, but not as much so in fresh fruits and vegetables. Though there are available limited harvesting machinery in the fresh fruits and vegetables fields, no means have yet been developed to efficiently and adequately harvest most of these products other than by hand labor.

Because of the unavailability of adequate mechanization, the producers of fresh fruits and vegetables have had to seek solutions to their harvesting, as well

as other pre-harvesting needs for field labor, (such as chopping and weeding), through the use of labor contractors, who have the ability to amass workers in sufficient numbers to render this labor service. Labor contractors also provide the required number of vehicles for transportation of produce to the packing sheds and to transport his employees to the fields. This equipment is not otherwise needed by the average grower or shipper for his operations, and would represent a large investment difficult to recapture.

The general scheme of this arrangement is that the grower and/or shipper involved will arrange with a labor contractor to provide the necessary field labor and equipment. In the harvesting operations, the grower and/or shipper will, by necessity, indicate to the labor contractor the times of harvest, location of the crop to be harvested and delivery point. This same scheme is used to a lesser degree in other pre-harvesting field operations.

Because of the sporadic need of such labor service among most individual growers and/or shippers, there is a large turnover. During any one week, one labor contractor may serve several different growers and/or shippers, and, further, general experience is that the individual labor contractor has a large turnover within his employees; that is, an agricultural employee may work for different labor contractors within a single week, depending upon the harvest work generated by the labor contractor through his grower and/or shipper contacts. The circumstances create significant employment record keeping problems over which the

labor contractor is more closely connected than the grower and/or shipper who is, at the time, involved in the effort of getting the perishable fruits or vegetables to market.

The labor contractor system has been the only solution available to the grower and/or shipper, large or small, faced with these difficult labor problems. The labor contractor's business is to have available to him sources of labor supply and equipment to offer this service. His arrangements with the grower and/or shipper may vary in details in individual cases. The facts in the instant case show the arrangement in a case involving a large shipper and grower. As the harvesting season terminates in one agricultural area and begins in another, the labor contractor transports his labor supply to a new area, many times to another state, for similar activities.

1966 Amendments to the Fair Labor Standards Act

The 1966 Amendments to the Act extended the Act's minimum wage provisions to agricultural employees for the first time, and, incidental thereto, the hot goods provisions of §15 of the Act. The child labor provisions relating to agriculture were also amended.

As noted in the evidence in the lower courts in the instant case, these labor contractors have been considered in the industry as independent contractors responsible for seeing that the minimum wage is paid to their agricultural employees and that no underage minors are allowed to work.

Prior to the 1966 Amendments, when the Act's only contact with agricultural employees was the child labor provisions, there was little Appellate Court activity involving the issues of the instant case. The only close case is *Mitchell v. A. R. Hertzke, et al.*, 234 F.2d 183 (10th Cir. 1956), where the Court held the shipper was not an employer, but the grower was. During this period though the shipper and/or grower were not employers if the labor contractor were an independent contractor, they could be in violation of the hot goods provision of the Act (§12(a)) if they had notice the labor contractor was employing oppressive child labor as defined by the Act at that time, (under 16 years old and working during school hours).

However, with the advent of the 1966 Amendments to the Act, with minimum wage and record keeping coverage, the shipper and/or grower became more exposed as to the labor contractor's employees. Congress was aware of this problem and considered this in their deliberations regarding these Amendments.

Congressional Intent — 1966 Agricultural Amendments

In Senate Report No. 1487 relating to the 1966 Amendments, there is reference to the Amendments pertaining to agricultural workers and this labor contractor situation as follows:

> "During the consideration of agricultural labor coverage, the committee discussed the issue of who is an employee of the farmer and how to determine whether a person is an in-

> dependent contractor. Section 3 of the Act defines the term 'employ,' 'employee,' and 'employer.' It is also clear that if a person is an independent contractor and not an employee of the agricultural employer, neither the independent contractor nor his employees would be employees of such employer." *U.S. Code Cong. & Adm. News*, 89th Cong. 2nd Sess. 1966, Vol. I, page 3012.

The full text of this portion of the Senate Report is set out in Appendix A appended to this Brief. The Senate Report refers to, and it is clear, Congress intended that the principles of *Rutherford Food Corporation v. McComb*, 331 U.S. 722 (1947), were to be used in these situations to determine whether the labor contractor was an independent contractor. The Report refers to six (6) factors mentioned in the *Rutherford* case for consideration in determining the independent contractor status. If an independent contractor, then the grower and/or shipper would not be held an employer of the agricultural employees.

After the passage of the 1966 Amendments, advice was sought from the Wage and Hour Administration regarding the status of these labor contractors. The Administrator issued two opinions in July and August of 1967 relative to this question, which are set out in the Appendix to the PETITIONER'S Petition on pages 50 through 52. In both of these opinions, it is clear that the Administrator was following Congress's intent in applying the principles of the *Rutherford* case on independent contractors and found on the facts pre-

sented in the request for opinion letters that the labor contractors, (crew leaders), were independent contractors for purposes of the Act. No reference was made to a "joint employer" concept.

Thus, upon passage of the 1966 Amendments, as reflected by the Congressional intent, an agricultural employee of a labor contractor was not an "employee" of the grower and/or shipper for purposes of the Act, if the labor contractor were an independent contractor under the principles of the *Rutherford* case. This concept was bolstered by the Administration Opinions of the Wage and Hour Department of the Department of Labor and not inconsistent with other existing decisions of this Court in this general area,[2] and of lower courts.[3]

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[2] *U.S. v. Silk, et al., Harrison v. Greyvan Lines, Inc.*, 331 U.S. 704, 67 S.Ct. 1463 (1947); the case of *Boire v. Greyhound Corp.*, 376 U.S. 473, 84 S.Ct. 490 (1964), cited often below, did not contain holding on these issues, but only references to the NLRB's joint employment findings, because the Court was concerned with the issue of reviewable of NLRB orders under the *Leedom v. Kyne* doctrine; also *Goldberg v. Whitaker House Corp., Inc.*, 366 U.S. 28, 81 S.Ct. 933 (1961), has been cited below; however, it involved an "employee" situation where a third party contractor was not present.

[3] *E.g., Fahs v. Tree-Gold Co-op Growers of Florida*, 166 F.2d 40 (5th Cir. 1948), was decided on independent contractor basis; its facts are distinguishable from instant case, *e.g.*, contractors were an integral part of processing operation working on the shed as opposed to separate harvesting operation and away from shipper's operations; no investment by contractors; no exercise of judgment, and more control was exercised by the processor, since the work was done on the processor's shed. However, the important aspect of case was that it was decided on independent contractor basis and followed criterion set out in *Rutherford* case, *supra*, referred to in the Senate Report, *supra*. See, also, trucker cases, *Wirtz v. Kneece*, 249 F.Supp. 564 (D.S.C. 1966); *Wirtz v. Manchester Sand, Gravel & Cement Co.*, 236 F.Supp. 885 (D.N.H. 1964); *Goldberg v. Warren Bros. Roads Co.*, 207 F. Supp. 99 (S.D.Me. 1962).

That these cases would be decided on an independent basis, as intended by Congress, was not only reaffirmed by such treatment by the Administrator in his opinions mentioned above, but through actual enforcement activities, as indicated by *Schultz v. Salinas*, 416 F.2d 421 (5th Cir. 1969), in which the Department of Labor sought enforcement against the labor contractor himself, and not the grower and/or shipper, with whom he was contracting.

In the face of this clear Congressional intent and consistent authority, the Courts below in the instant case held, for the first time, the grower and shipper and the labor contractor to be "joint employers", not reaching the independent contractor issue, though implicitly holding that the labor contractor was an independent contractor by virtue of the Court's holding him to be an "employer". In holding the PETITIONER shipper and grower to be a joint employer with the labor contractor, it makes the labor contractor's employees "employees" of the PETITIONER, even though, implicitly, the labor contractor was held to be an independent contractor by virtue of the Court's joint employer holding. This holding directly offends expressed Congressional intent.

Because the lower court's holding is in variance with Congressional intent and the principles of the *Rutherford* case, *supra*, in not deciding the case on an independent contractor basis, but deciding it on a basis so as to circumvent this issue, this Court should review this case and correct this error, and give some guidance to this part of the agricultural industry as

to its responsibilities under the Act vis-a-vis the labor contractor's employees. The Court has not heretofore considered this question, and correction and clarification are clearly needed. This need is further emphasized by a similar recent decision in *Hodgson v. Okada*, 472 F.2d 965 (10th Cir. 1973), decided on similar principles as the instant case.

Hot Goods Provisions

The questions in this case do not involve the social aspect of providing protection to employees through coverage by the Act — a point apparently missed in many of the lower courts' decisions — there is no question that the employees *are* protected by the Act. The questions here involve responsibility by others for violations of the Act by labor contractors. Clearly, a denial of the protection of the Act accorded agricultural employees can be remedied by direct action against the labor contractor himself, who is the one in violation of the Act.

The ASSOCIATION encourages the protection accorded agricultural employees by the Act and does not here imply that it condones knowledgeable allowance of violations of the Act, or "ostrich-like attitudes" by those engaged in the industry. However, under the holdings in the instant case and the *Okada* case, *supra*, and, further, by the fairly recent case of *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668 (5th Cir. 1968), which involved the violation of the hot goods provisions by a steel mill operator dealing with an independent hauling contractor, the ASSOCIATION'S members are placed in a dilemma.

In the *Lone Star* decision, *supra,* the steel mill operator was held in violation of the hot goods provisions, because he *could or should have known* of violations by the independent contractor haulers. The Court below in the instant case follows this rationale.

If this decision stands, the grower and/or shipper is placed in a dilemma certainly not intended by Congress. The criterion set out in the *Rutherford* case revolves around control. Due to the nature of the agricultural business, as discussed above, the grower and/or shipper has practical difficulties maintaining any type of records on the labor contractor's employees, and to exercise the control indicated by these court of appeals cases requires undue interference in the labor contractor's affairs during the critical and hectic period of harvest and unnecessary increased supervision costs, which directly affect the cost of the foodstuff being produced.

The hot goods provisions of the Act relating to both child labor and minimum wages, (§§12(a) and 15(a)(1)) provide that no violation occurs if a grower and/or shipper does not have knowledge or written assurance and notice of minimum wage or child labor violations. These statutory provisions are clear; however, the courts below have gone beyond the statute's tests by applying the broader test of ". . . could or should have known . . .". This is error.

An employer in the chain of commerce must have notice of violations, then action is dictated to alleviate the violations. This is especially critical in this indus-

try where perishable fruits and vegetables are involved. A delay in marketing is a loss of the produce.

However, under the RESPONDENT'S theory below, and now with lower court sanction, under the circumstances of the industry, the shipper and/or grower becomes an actual enforcer of the Act. To abide by these decisions, the shipper, and/or grower must make investigations, as does the Wage and Hour Division, to seek out violations, rather than take steps to correct them, once discovered.

It is submitted that this was not the intention of Congress in covering agricultural employees by the Act's provisions. This Court has not considered these provisions of the Act as it relates to these agricultural situations, and it is requested to do so for the guidance of the agricultural industry.

CONCLUSION

For the reasons above, it is respectfully requested that the Court grant the Petition of GRIFFIN AND BRAND OF McALLEN, INC., and review the judgment and decision of the Court of Appeals in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. GLENN JARVIS, do hereby certify that I have this day forwarded for service three (3) copies of the above *Amicus Curiae* Brief to the Solicitor General, Department of Justice, Washington, D.C., 20530, counsel for Respondent, by depositing same in the United States mail, with first class postage prepaid, airmail, and three (3) copies of same to H. H. Rankin, Jr., counsel for Griffin and Brand of McAllen, Inc., Petitioner, by depositing same in the United States mail with first class postage prepaid.

DATED this, the __ day of May, A.D., 1973.

R. Glenn Jarvis

APPENDIX A

EXCERPTS FROM SENATE REPORT NO. 1487

"An amendment was adopted by the committee to remove the exemption in the House bill of approximately 30,000 agricultural workers whose wage rates are set by the Secretary of Agriculture under section 301(c)(1) of the Sugar Act of 1948. In adopting this amendment, the committee understands that the Secretary of Agriculture would still establish the wage rate of such worker subject to such worker's receiving no less than the applicable minimum wage established by the Fair Labor Standards Act. The committee sees no reason why these agricultural workers should receive less than the minimum wage.

During the consideration of agricultural labor coverage, the committee discussed the issue of who is an employee of the farmer and how to determine whether a person is an independent contractor. Section 3 of the act defines the terms employ, employee, and employer. It is also clear that if a person is an independent contractor and not an employee of the agricultural employer, neither the independent contractor nor his employees would be employees of such employer. Nor could the man-days worked of such employees be counted toward such agricultural employer. However, such independent contractor may well qualify as an agricultural employer and be subject to the coverage of the act unless otherwise exempted. This same issue was raised during the House debate with regard to the status of certain sharecroppers and tenant farmers. The same tests apply as stated in the House report.

The Supreme Court (in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (67 S.Ct. 1473, 91 L.Ed. 1772, 1947) has made it clear that there is no single rule or test for determining whether an individual is an employee or an independent contractor, but that the "total situation controls." In general an employee, as distinguished from a person who is engaged in a business of his own, is one who "follows the usual path of an employee" and is dependent on the business which he serves. As an aid in assessing the total situation, the Court mentioned some of the characteristics of the two classifications which should be considered. Among those are —

(1) The extent to which the services rendered are an integral part of the principal's business;

(2) The permanency of the relationship;

(3) The opportunities for profit or loss:

(4) The initiative, judgment, or foresight exercised by the one who performs the services;

(5) The amount of investments; and

(6) The degree of control which the principal has in the situation.

The committee fully subscribes to these criteria and to the principle that the total situation in a given case, not just a particular criterion, must be considered in determining whether an individual is an employee or an independent contractor."

U.S. Code Cong. & Adm. News, 89th Cong. 2nd Sess. 1966, Vol. I, pages 3012-3013.